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The European labour authority and enhanced enforcement

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The European Labour Authority and Enhanced Enforcement¹

KEY FINDINGS

One of the main findings from research is that the competence to act of enforcement bodies is limited to their national territory, although mobility is enshrined in a regulatory EU-frame. Therefore, it could be considered to include into the Regulation the Authority's competence to strengthen the legal capacity of national enforcement bodies in joint and EU-wide investigations in cases of intra-EU infringements or irregularities related to cross-border labour mobility (based on Articles 81 on judicial cooperation in civil matters having cross-border implications, and Article 82 TFEU on judicial cooperation in criminal matters including).

Secondly, to increase effectiveness of enforcement, the Authority's activities should contribute to a reduction of dispersed compliance and enforcement activities at national and at EU-level. The planned combined tasks relating to cross-border labour mobility and the coordination of social security could be complemented with legislative areas not previously covered, such as the tackling of artificial arrangements (letterbox companies) and the fight against fraudulent service providers. This would imply to integrate other parts of the Union acquis into the Authority's scope, such as the obligations regarding cooperation in case of fraudulent provisions of services.

Research also shows that an overall fining policy is missing in the area of cross-border breaches. In order to ensure better enforcement, the Regulation should enhance the development of a EU-wide fining policy. To this end, a separate article could be added to the Regulation laying down guidelines for a joint fining policy.

Contrasting with other EU-wide enforcement actions (e.g. in consumer protection), the Authority cannot order the cessation/prohibition of infringements. An introduction of competences to bring about the cessation or prohibition of an intra-Union infringement might contribute to effective and dissuasive enforcement.

Currently, the issuing of alerts is limited to Member States. It could be considered to provide designated stakeholders, such as the recognised competent European trade union and employers' organisations, with the power to issue external alerts to the competent authorities of the relevant Member States and the Authority of suspected infringements covered by this Regulation.



Introduction

In September 2017, President Juncker of the European Commission announced in his State of the Union Address at the European Parliament plans to establish a European Labour Authority, a new European inspection and enforcement body for ensuring fairness in the Single market. The European Commission launched a draft regulation on 13 March 2018. The draft was published, together with an Impact assessment and a synopsis report that summarises the outcomes of the stakeholder consultation. Moreover, the Commission decided to install a European Advisory Group for the European Labour Authority. The proposal sets out that the European Labour Authority should help individuals, businesses and national administrations to get the most out of the opportunities offered by free movement and to ensure fair labour mobility. According to the proposal, the agency shall pool some of the existing EU tools and structures, both by taking over and by replacing these. The Authority is expected to be operational from 2019.²

The focus of this briefing is on the principles (Chapter 1) and the tasks of the Authority (Chapter 2). It is structured as follows:

- A brief analysis of existing enforcement problems
- The Authority-proposals for a more effective enforcement
- Positive aspects and shortcomings
- Policy recommendations.

The briefing forms part of a series of notes having been prepared in the context of a Workshop on the European Labour Authority held at the extra-ordinary meeting of the Employment and Social Affairs Committee on 24 May 2018. Other briefings cover the following topics:

- European Labour Authority: Profile and Governance by E. Vos
- European Labour Authority and Social Security Coordination by S. Giubboni
- European Labour Authority and Support for Labour Mobility by V. Ludden / A. Jeyarajah
- European Labour Authority, EU structures and tools by S. Kraatz
- European Labour Authority: Workshop Summary Report by S. Kraatz.

A brief analysis of existing enforcement problems

The European Labour Authority's objective is to help strengthen fairness and trust in the Single Market. To that effect the Authority should support the Member States and the Commission in strengthening access to information about rights and obligations in cross-border labour mobility situations and in facilitating the solution of cross-border labour market disputes or irregularities. What do we know about the functioning of the actual compliance control and enforcement practices?

Compliance control is regulated in several intertwined areas. On the one hand, it is based on competences to decide on and to control compliance with the regulatory framework of pay and working conditions, social security and tax obligations stem from and are related to principles and rights enshrined in EU and national legislation (in the labour, social security and fiscal domain). On the other hand, these competences relate to provisions in agreements resulting from collective bargaining. The experience is that compliance control is hampered in most of these areas, as soon as a transnational dimension is introduced on local labour markets.

In the last decennia, this became manifest in several industries, first of all labour-intensive industries such as construction, manufacturing, shipbuilding, transport and logistics, but in the meantime also in all kind of services.³ The use in a cross-border context of a foreign (artificial) legal entity can lead to the introduction of questionable forms of labour recruitment, with blurred labour relations, the circumvention of social security payments and tax evasion. The freedom of establishment and the free provision of services sometimes serve as a breeding ground for artificial arrangements (such as letterbox companies), as these freedoms provide an unrestricted entrance to the EU Member States' labour markets.

A review of research on enforcement practices related to cross-border mobility, posting of workers and transnational recruitment detects a number of challenges.

- The activities of most competent national authorities relevant for cross-border labour mobility end at the border, as **the mandate of the control and enforcement institutions is limited to the national territory**. Joint activities beyond national borders need more legal backing.⁴
- The monitoring of rules and regulations for cross-border labour mobility and the transnational provision of services with foreign labour is **hampering also because competences are fragmented over several disciplines**. An effective enforcement benefits from multidisciplinary cooperation.⁵
- The competence **to deregister fraudulent establishments lies outside the competences of the compliance authorities**.⁶
- Problematic for all stakeholders in a compliance campaign is **the lack of effective sanctions**. Social fraud is still not seen as a major offense that justifies a **European-wide sanctioning**. **Fines are weak in an extra-territorial context** and most countries have **no specific enforcement instruments related to labour mobility**.⁷
- The tackling of artificial arrangements and fraudulent cross-border labour mobility **very often comes too late and these practices can pop up repeatedly**; this leads to serious frustrations.
- The fact that infringement problems in the area of cross-border labour mobility are brought under a single heading with illegal work is not very helpful as **it directs the policing towards the workers without tackling the true causes**.⁸

The **Commission's impact assessment**, based on a series of topical research reports, confirms most of the signalled shortcomings. National compliance arrangements that protect workers' interests are not adapted to the enforcement challenges in the Single Market. The assessment pinpoints insufficient capacity of national authorities to organise cooperation with authorities across borders, although this is essential for effective and efficient handling of cross-border issues. Moreover, the assessment signals weak or absent mechanisms for joint cross-border enforcement or mediation activities.⁹

The Commission proposal for a more effective enforcement by ELA

This briefing is mainly dedicated to aspects in the Commission proposal for a European Labour Authority, relevant for a more effective enforcement. This has been listed by the European Commission as core business of the European Labour Authority, including increased cooperation between national administrations, the combining of existing instruments of cross-border labour mobility and the organisation of joint transnational control activities. Key elements of the proposal issued by the European Commission in March 2018 are summarised in the scheme below.

Enforcement aspects under the proposed Regulation (EU) 2018/0064 establishing a European Labour Authority	
The enforcement beyond national borders	<ul style="list-style-type: none"> - the Authority shall assist Member States and the Commission in matters (...) within the Union (Article 1.2). - the objective is to ensuring fair labour mobility within the internal market (Article 2), - and (under Article 2.b) support cooperation in the cross-border enforcement of relevant EU law, including facilitating joint inspections. - if MS refuse to cooperate, joint inspections will take place only in the participating MS (Article 9.3).
The competences in different policy areas	<ul style="list-style-type: none"> - the Authority shall enjoy the most extensive legal capacity accorded to legal persons in the MS (Article 3.2). - it shall facilitate cooperation and exchange between national authorities (Article 5.c). - concerted, joint inspections are carried out in accordance with the national law of the concerned MS (Article 10.2). - several existing structures will be integrated or the cooperation with existing structures will be streamlined (recitals 12, 30, 31, 32, 33)
The tackling of fraudulent establishments	<ul style="list-style-type: none"> - if the Authority becomes aware of irregularities beyond the scope of its competences, it shall report to the Commission and the MS (Article 10.7).
The sanctioning in an extra-territorial context / The EU-wide effect of sanctions	<ul style="list-style-type: none"> - upon request of national authorities, the Authority shall facilitate cross-border enforcement procedures of penalties and fines (Article 8.1.d)
An alert mechanism for stakeholders	<ul style="list-style-type: none"> - a request for concerted action has to come from one or several MS; the Authority may also suggest concerted, joint actions (Article 9.1). - it shall facilitate cooperation between relevant stakeholders (Article 5.g)

ELA and increased cooperation between national administrations

The European Commission's Impact assessment confirms the need for enhanced cooperation, as reported by several researchers. National competent enforcement and compliance authorities are unable to meet their liabilities as soon as transnational elements enter. Moreover, their cooperation is hampered by fragmented national mandates and dispersed competences and related legal and operational difficulties to trace circumvention in cross-border situations. **Cooperation across the territorial borders and across the disciplines** is of utmost importance. the objective of the Authority to contribute to ensuring fair labour mobility in the internal market fits in a more operational implementation of the *acquis communautaire*. It can also be seen as an indispensable complement at EU-level of national measures that were formulated.¹⁰ The proposed Regulation is seeking to meet these challenges by stressing the Authority's role of assistance and support of Member States in their cooperation and change. The assistance includes facilitating joint inspections.

The combining of existing instruments related to cross-border labour mobility

The proposed Regulation for a European Labour Authority sets the objective to work towards a combination of existing instruments, dealing with separate aspects of mobility. **Better integration of the work of these instruments** is seen in the proposal for a European Labour Authority as a necessity for a more effective cooperation. The proposal lists relevant EU networks and instruments the agency will integrate, replace or work with, such as the Administrative Commission for the Coordination of Social Security Systems (including its Advisory Committee for the Coordination of Social Security Systems, the Conciliation and the Audit Boards, and its Technical Commission) the Technical Committee and the Advisory Committee on the Free Movement of Workers, the Committee of Experts on Posting of Workers, the European Platform tackling Undeclared Work (UDW Platform) and the EURES European Coordination Office managing the EURES network. An assessment of the different bodies would exceed the remit of this note.¹¹

The Impact assessment describes the limits of these bodies in the operational field and the need for a more coordinated and overarching approach. Overall, these bodies are facing constraints in their ability to provide support to national authorities due to a **lack of executive and operational powers**. Except for the Administrative Committee having legislative competences (explanatory decisions and recommendations related to interpretation problems in the field of the Regulations for coordinating social security), there is **little direct involvement in the operational work** that is needed. Further, the **in-depth specialisation of each committee on its target legislation** is not matched by the development of interlinkages with other bodies competent on neighbouring policy areas. The focus is on one issue or aspect, although the problematic aspects of labour mobility call for coordinated action across all relevant policy areas. Thirdly, most bodies have **no permanent structure** and **participation is voluntary**.

The organisation of joint transnational control activities

President Juncker stated (in his September 2017 State of the Union¹²) that *‘we should make sure that all EU rules on labour mobility are enforced in a fair, simple and effective way by a new European inspection and enforcement body. It is absurd to have a Banking Authority to police banking standards, but no common Labour Authority for ensuring fairness in our single market.’* So far, there is a **lack of transnational competences regulated at EU level** that can serve as instruments to look after the **social consequences in the free provision of services or the freedom of establishment** in the Single market. Problems related to labour mobility can only be effectively tackled by an authorised institute with the mandate to exercise any or all of its powers across the EU. Therefore, in order to act effectively, the Authority would **need a broad mandate to detect and investigate, with the competence to take all necessary enforcement measures**. In the proposed Regulation this is reflected, among others, in Articles 9 and 10 that seek to formulate the building blocks for concerted, joint inspections.

Positive aspects and shortcomings

In this section, a first assessment is made of Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority, based on the experiences of the labour inspectorate and other compliance and enforcement authorities. The analysis of existing enforcement problems reveals that fragmented national competences and too strong demarcations of mandates hinder the effective tackling of breaches and abuses. Most researchers consider concerted joint action of national compliance and enforcement authorities as key for the fight against fraudulent practices with cross-border labour mobility. Also the need to authorise national compliance authorities, with competences to check and investigate the respect for the applicable rules has been formulated frequently. Thirdly, practitioners make reference to a more effective execution of sanctions (with a transnational effect) in cross-border situations. Enforcement activities related to labour mobility problems and irregularities have to be made more efficient through combining existing national instruments across all relevant and intertwined policy areas (social legislation,

binding collective agreements, social security and tax obligations), combined with an in-depth analysis of the mechanisms behind circumvention practices and similar breaches. Working towards advises to the European legislator in interfering domains of the internal market and the communitarian *acquis* (as suggested in Article 10.7 of the proposed Regulation); and a clear division of labour between the existing bodies and the Authority can complement this approach.

Positive aspects

First of all, the draft proposal recognises that **enhanced enforcement** is of the utmost **relevance for the functioning of the Single Market**. Already in the first recital, reference is made to the free movement of workers, the freedom of establishment and the freedom to provide services. Moreover, the Authority is not (only) an instrument relevant for the EU social policy, the activity of the Authority enters into the core of the functioning of the Single Market as the Authority has to deal with the practical application of Union law. Article 10.7 of the proposal talks about ‘suspected irregularities in the application of Union law, including beyond the scope of its competences’.

Secondly, the draft proposal **recognises the problems with dispersed compliance and enforcement activities** at national and at EU-level. The European Commission realises that, as a result of a fragmented division of labour between different national authorities and of intertwined policy areas with different compliance traditions, enforcement can only be successful if it takes place across borders. The notion of concerted, integrated and joint actions has a prominent role in the proposals.

Thirdly and strongly related to this, consistency asks for **risk assessment** (Article 11), **monitoring and investigations across disciplines**. The Authority provides **mechanisms for dialogue, conciliation and mediation** (Article 13), but also organises the exchange of available data and knowhow (Articles 8 and 16). This includes the exploration of synergies with other relevant EU initiatives and networks.

Fourthly, the **strengthening of the capacity of national authorities**, combined with intensified information provisions, is seen as a *sine qua non* for the promotion of genuine cross-border labour mobility. The Authority has to provide operational assistance, including practical guidelines and training (Article 12).

Shortcomings

At the same time, the proposal shows a number of points that need further discussion and clarification:

a. Facilitating and strengthening joint inspections

The practical experience with pilots of joint inspections have shed light on the shortcomings of the current cross-border enforcement and mutual assistance activities.¹³ Barriers encountered in compliance activities at national level are often caused by **frictions between the existing juridical frame** that the **internal market** provides for service providers and foreign establishments and the **limited territorial mandate of the competent inspection authorities** as an EU-wide authorisation is missing. In the quoted practical research, it clearly appears that the activities of most competent national authorities in the social field end at the border, as the mandate of the control and enforcement actions is limited to the national territory. The competence to check the reliability of documents, which underpin the cross-border activity and, if necessary, to withdraw these documents, is missing. As **most cases stem from situations based on EU internal market rules**, such as the EU freedom of establishment and the free provision of services, **an EU-legitimised mandate that can be performed by national competent authorities** in both the sending and the receiving country **seems appropriate**.

The Regulation for a European Labour Authority could change this not only by providing national compliance authorities with the right to organise and participate in trans-border actions and to set up

teams. Beyond this, **the mandate to act jointly has to be strengthened**. The authority should **legitimise**, monitor and supervise the **activities of the national compliance bodies**. This includes the competence to initiate investigations that go beyond the competence limitations that exist in (some) Member States in relevant policy areas. This is the most fundamental added value that the authority could deliver. Firstly, it should be regulated that **evidence stemming from exchanged information, mutual assistance and joint inquiries is legally validated across the EU**. Secondly, national compliance authorities that jointly carry out their duties should be empowered **to conduct EU-wide all necessary inspections of undertakings and related investigations**. Reference can be made in this respect to **inspection mandates in other areas** (for instance powers of inspections in coordinated actions in the area of antitrust or consumer protection).

b. The development of a fining policy that is effective and dissuasive

The proposed ELA Regulation **leaves open how to achieve an enhanced practice of fining policies** in order to increase the effectiveness of enforcement. Even if Article 8.1.d sets out the task to ‘facilitate cross-border enforcement procedures of penalties and fines’, **the internal market rules** that regulate the economic freedoms so far have **little fining or redress mechanism in the field of cross-border activities**. There is a lack of effective and dissuasive sanctions related to irregularities in cross-border labour mobility. And, for instance, SLIC (Senior Labour Inspectors Committee) concluded that several kinds of penalties were not guaranteed in a transnational context, based on the CIBELES project (see Annex). Moreover, **the detection of fraud or infringements in one Member State does not affect the start of comparable fraudulent activities in another Member State**. A fining policy must fulfil two objectives: to punish and to deter. Breaches cause harm to the economy and long running breaches undermine the free movement principles. Therefore, the proposed **Regulation** for a European Labour Authority should include **main rules for an EU-wide fining policy and for procedures to bring about the cessation or prohibition of irregularities** in case of violation of the law. The least the Authority should do is to develop an **alert mechanism** comparable to the mechanism established, for instance, in the area of consumer protection.¹⁴

c. Mediation, dispute solving and relevant stakeholders should be reconsidered

The proposed mediation is a step forward, but some issues, such as the question of **access to the mediation and dispute solving**, remain **unclear**. The proposed ELA Regulation **limits the possibility to request** the Authority to launch a mediation procedure to the Member States. Given the broad range of existing national practices in the area of control and enforcement of labour market regularity, this seems to be **a too narrow procedure**.¹⁵ The regulatory frame for fair labour mobility is set, on the one hand, by the legislator (at national level often based on tripartite structures), on the other hand by the partners in collective bargaining. Member States have installed paritarian, sectoral or interprofessional bodies with a mandate to act if there is an industrial dispute or in case of irregularities. These joint bodies, often composed of representatives of management and labour have the task to prevent, solve and settle disputes. Social partners have established compliance and counselling institutions and cooperate in concerted campaigns. One key element that is missing is the **possibility for the social partners**, in the end the holders and initiators of collectively agreed wages and working conditions, **to request the Authority’s intervention**, notably in situations where labour legislation and legally agreed working conditions are intertwined. The second element that is unclear is **the status of the Authority’s decisions and dispute solutions**. The decisions should be understood as decisions giving effect to the measures taken to bring about the cessation or the prohibition of the irregularity.

d. The legal competences of the Authority are modest

The scope of the Authority’s competences and the broader legal basis of its work could be better reflected in the references of the Commission proposal. President Juncker’s wording was well-chosen, the Authority is **about ensuring fairness in the Single Market**. Reference to the right of establishment ‘*under the conditions laid down for its own nationals by the law of the country where such establishment is effected*’ (Article

49 TFEU) and to the freedom to provide services '*under the same conditions as are imposed by that State on its own nationals*' (Article 57) could add core elements of the Union acquis to the scope of the Authority. Based on the same reasoning, reference to the prevention of fraud and unfair competition, as formulated in several parts of the acquis could further enhance **the necessary broader scope of competences**. For example, obligations regarding administrative cooperation in case of fraudulent provision of services, stemming from Directive 2006/123/EC of the European Parliament and the Council on services in the internal market (Chapter VI), interfere directly in the work of the Authority and, therefore, can be mentioned as belonging to the scope of the work of the Authority.

Policy recommendations

In the practical and operational cooperation, the concerted joint action of national compliance and enforcement authorities is seen as key for the fight against fraudulent practises with cross-border labour mobility. Currently, the national compliance authorities lack the competences and legal capacity to check and investigate the respect for the applicable rules from a transnational perspective. Moreover, demarcations between the competences hinder the in-depth and adequate compliance control activities. This leads to the following policy recommendations.

- The work of the European Labour Authority should lead to an enhanced enforcement of rules and regulation in the Member States. In order to contribute to this aim the strengthening of **the competences and legal capacity of the national compliance authorities** have to be considered in their joint actions. A first step should be the provision of an EU-wide authorisation to act in cases of irregularities that ask for EU-wide investigation. Therefore, Article 5, 9 and 10 of the proposal could **provide the joint work of national authorities with legal capacity**. The Authority should take all necessary measures to enable officials from the involved Member States to play an effective role in joint activities. To that end, it might be functional to provide the national officials with the authorisation to carry out the duties entrusted to them under the same power as the officials from the Authority.
- Secondly, it could be settled that the national authorities involved may use as evidence any information, documents, findings, statements, certified copies or intelligence communicated, on the **same basis as similar documents obtained in their own Member State**.
- Thirdly, the Authority could pave the way for an integrated approach and **make an end to dispersed compliance and enforcement activities at national and at EU-level**. The combined tasks related to matters relating to cross-border labour mobility and the coordination of social security, could be **complemented with legislative areas not previously covered, such as the genuine provision of services**. This would mean the integration of the tackling of artificial arrangements (related to the freedom of establishment) and the cooperation stemming from the fight against fraudulent service providers (chapter VI of the Service Directive) into the Authority's scope of activities.
- The Authority should do relevant work towards an improvement of the fining policy in the area of cross-border breaches. The ELA Regulation could lay down the **main rules for an EU-wide fining policy** and for procedures in case of violation of the law. This could be done in a separate article.
- The Authority should have **means to suspend** activities and take down websites of fraudulent actors, to impose interim measures for widespread infringements with a Union dimension, to impose penalties proportionate to the cross-border dimension of the practice.

The Regulation could provide designated stakeholders, other than the Member States, such as the recognised competent European trade union and employers' organisations that are consulted by the Commission under Article 138 of the Treaty, **the power to issue an alert** to the competent authorities of the relevant Member States and to the European Labour Authority of suspected infringements and to provide information available to them.

Annex: Overview of selected research on enforcement of cross-border labour mobility

One of the first assessments of the implementation of the Posting Directive¹⁶ (hereafter PWD) examined in 2003 the legal context and the practical functioning of the PWD in the framework of the free provision of services. In 2003, Member States had **hardly developed measures to ensure compliance** with the posting rules. Liaison offices and national compliance authorities suffered from **a lack of staff and competences were too dispersed to guarantee effective control**. Verification of the genuine application of labour regulations proved to be an arduous path. For instance, the fact that under the applicable rules for the coordination of social security, the decisive authority as to whether a person is employed or self-employed is the sending state, whereas under the PWD it is the receiving state, caused misunderstandings and a lack of clarity. Checking **whether foreign undertaking was a genuine undertaking, pursuing substantial economic activities on a stable basis, was very difficult**. As a result, the inspectorate had serious problems in controlling the genuine character of this type of cross-border labour mobility.¹⁷

The functioning of the principles formulated by the PWD was reinvestigated in 2010, across 12 country cases, with fact finding based on available national sources, control related data and statistics, prominent cases, best practices and the use of information from the liaison offices and compliance institutions (such as the inspectorate) responsible for monitoring the terms and conditions of employment. Compared to the 2003 study, the final report identified **even greater divergence** in transposition and application. The researchers found **cross-border recruitment methods, ranging from genuine long-established partnership between contracting partners to completely fake letterbox practices of labour-only recruitment**. In the enforcement practices, **competences were dispersed over several institutions**, the **division of labour in one country did not match the division in another country** and national cooperation between different institutions involved (tax revenue, social security, labour inspectorate) was often lacking.¹⁸

The project CIBELES that aimed to improve the exchange of information and to ensure enhanced cross-border enforcement and mutual assistance in inspection and sanctioning proceedings led to comparable conclusions.¹⁹ CIBELES was approved by the Senior Labour Inspectors Committee (SLIC) and supported by the European Commission's PROGRESS Programme. A SLIC Plenary adopted in 2012 a Consensus paper that reflected the results.²⁰ The conclusion was that **neither mutual assistance nor cooperation among labour inspectors can rely on a complete and common legal basis**. The inspection services signalled **a lack of national networking of all relevant compliance offices** and authorities; **an integrated information system on features of labour mobility was missing**. Information was spread over several instances, with **demarcations of and limitations to competences** that differ in every Member State. According to SLIC, improved cooperation could be reached by the recognition and promotion of all existing forms of mutual assistance and cooperation **at the same level as in other parts of the acquis**. In order to enhance the cross-border enforcement practices, **evidence resulting from such cooperation should have the same legal value** as evidence obtained from national investigations and **the execution of penalties should be guaranteed**.

In the frame of a series of ongoing projects (2010-2018), the French Institut National du Travail, de l'Emploi et de la Formation Professionnelle (INTEFP), with an active participation of (almost) all Member States, is organising pilots with joint investigations in specific cases and exchanges between the inspectorate, the

social partner organisations, liaison offices and other relevant national bodies. The results show that control of the regularity and the collection of evidence and supporting documents are hindered by **fragmented competences and a lack of mandate in the host country**. Participants in the project often have to conclude that, **once irregularities are detected, an accumulation of breaches and circumvention is the rule rather than the exception**. This raises the question where the competence lies for the overall compliance control of the regular character of cross-border labour mobility. **Deficient competences become manifest** as soon as activities refer, rightly or wrongly, to labour mobility in the frame of the freedom of establishment (in another constituency), the contract freedom and the freedom to provide services.²¹

Research in 2017 focused on the results of a joint campaign of the Dutch social partners and the government to enhance the cooperation in the fight against letterbox companies and in the enforcement of statutory working conditions and collective agreements. The assessed files provided evidence that cross-border recruitment was used as a labour cost saving method, with savings on direct wage costs resulting from **partial or non-compliance with established standards**. The competence is lacking to decently check compliance in situations with several subcontractors in a triangled cross-border context (with a country of origin, a host country and another country for the financial transfers). The assessment found indications of **questionable practices in contiguous policy areas** (social security, taxation). In the dishonest cases, a **formal reference to freedom of establishment and free service provision turned out to be a façade for non-compliance**. Involved firms were very well aware of the fact that compliance control is depending on time-consuming research and that **competences to tackle breaches effectively are missing**. The research pointed to the **decisive importance of competences and the operational mandate of the involved institutions**.²²

A 2017 project, led by the Bratislava Centre for the Research of Ethnicity and Culture, analysed patterns of labour migration and mobility in the Visegrad countries (V4). It focussed on the **labour mobility of third country workers** and found several breaches with labour contracts being absent, payment less than the minimum wage, extremely long working hours and an unclear legal status. Official data on labour migration were lacking or severely understated. **No institution had an explicitly defined mandate** to tackle labour exploitation or the labour rights violations of migrant workers. The research highlighted the key role of agencies based in a foreign constituency, using the freedom of establishment. The workers received cash payments and the intermediate agency kept a significant proportion of their wage. **Cases involving exploitative practices (e.g. long working hours, unfair or unpaid wages, lack of work contracts and other breaches) were qualified as cases of illegal work** in which migrant workers were perceived as perpetrators rather than victims. Employers exploiting labour migrants were given **no criminal sanctions** for doing so as only fines for illegal employment could be imposed. The **capacity of labour inspectorates to investigate labour rights violations were limited** because documents provided by the employers were the only source of information they could rely on instruments for a decent assessment were lacking.²³

- ¹ See also the author's preparatory study: Cremers, J. (2018) Towards a European Labour Authority - Mandate, Main Tasks and Open Questions, FES: Brussels. To download via: <http://library.fes.de/pdf-files/bueros/bruessel/14054.pdf>.
- ² <http://ec.europa.eu/social/main.jsp?langId=en&catId=1414&newsId=9061&furtherNews=yes>.
- ³ Bernaciak, M. (2015) Market Expansion and Social Dumping in Europe, Routledge: London.
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- ⁷ Cremers, J. (2017). The enhanced inspection of collectively agreed working conditions: An assessment of the compliance files, based on the Social Pact 2013. Executive summary. Tilburg Law School: Tilburg.
- ⁸ Chudžíková, A. H. and Z. Bargerová (2018) Victims of labour exploitation or "illegal" migrants? Ukrainian workers' labour rights protection in Slovakia. CVEK: Bratislava.
- ⁹ European Commission (2018). Impact Assessment - Accompanying the document Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority Commission Staff Working Document, Brussels.
- ¹⁰ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (OJ L 159, 28.05.2014).
- ¹¹ For a brief description see: Cremers, 2018, page 10-11.
- ¹² http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.
- ¹³ http://www.eurodetachment-travail.eu/datas/files/EUR/synthesegenerale_2013_FR.pdf.
- ¹⁴ Regulation (EU) No 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.
- ¹⁵ Cremers, J. (2017). The enhanced inspection of collectively agreed working conditions: An assessment of the compliance files, based on the Social Pact 2013. Executive summary. Tilburg Law School: Tilburg.
- ¹⁶ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18, 21.1.1997).
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- ²¹ Reports can be downloaded from: <http://www.eurodetachment-travail.eu/Default.asp?rub=&lang= fr>.
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